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Office of Administrative Law Judges
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Issue Date: 27 January 2003

CASE NOS.: 2002-LHC-1195
2002-LHC-1196

OWCP NOS: 18-73791
18-75741

In the Matter of :

JOSE ALVAREZ,
Claimant,

v.

SSA TERMINALS,
Employer,
and

HOMEPORT INSURANCE CO.,
Insurer.

Appearances

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For the Claimant

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For the Employer & Insurer

Before: Paul A. Mapes
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises under the Longshore and Harbor Workers' Compensation Act, as amended (hereinafter, the "Act" or the "Longshore Act"), 33 U.S.C. §901 *et seq.* In brief, Jose Alvarez (hereinafter "the claimant") alleges that he suffered cumulative trauma and sudden trauma injuries to his cervical spine and right shoulder while working as a refrigeration mechanic for SSA Terminals (hereinafter "the employer") between July 16, 2000 and April 30, 2001. A trial on the merits of these claims was held in Long Beach, California, on October 31, 2002. During the trial, the following

exhibits were admitted into evidence: Claimant's Exhibits (CX) 1-12 and Employer's Exhibits (EX) 1-17.

BACKGROUND

The claimant was born in Mexico on August 7, 1942, and completed a secondary school education while living in Mexico. Tr. at 76, EX 11 at 118. In the 1960's, he came to the United States and eventually began working as a mechanic in southern California. Tr. at 74, 77. In 1978, he began working as a mechanic for Matson Terminals, which later became SSA Terminals. EX 11 at 128-29, Tr. at 74-75. For at least the last 10 years, the claimant worked primarily as a refrigeration or "reefer" mechanic. Tr. at 75. His duties as a reefer mechanic included responsibility for washing out shipping containers, connecting and disconnecting electrical cords, repairing containers, climbing ladders, and working aboard ships. EX 11 at 132, Tr. at 77-111.

While working for SSA Terminals on July 16, 2000, the claimant was assigned to wash out a refrigerated container with a hose. Tr. at 111. While the claimant was pulling on the hose, it got struck on something and caused the claimant to fall onto his right shoulder. Tr. at 111-12. Later that day, the claimant went to a Kaiser Permanente facility where he was examined by Dr. Kevin Ruhge. CX 6 at 108. According to notes dictated by Dr. Ruhge, the claimant landed on his outstretched right arm and had complaints of right shoulder pain. CX 6 at 108. Dr. Ruhge's diagnosed the claimant's condition as a right shoulder contusion and provided the claimant with a right arm sling. EX 6 at 23. In addition, Dr. Ruhge determined that the claimant should remain off work for at least a week. CX 6 at 108. During the following months, the claimant returned several times to Kaiser Permanente for follow-up visits and was usually seen by Dr. Sangarapil Manoharan. CX 6 at 89-106, 110-11.

On August 17, 2000, the claimant was seen by Dr. Roberto Velasco, a Kaiser Permanente orthopedic surgeon. EX 9 at 79-80. Dr. Velasco noted that the claimant had been experiencing right shoulder and arm pain since a work injury in 1999 and that his right arm symptoms had worsened as a result of his July 2000 injury. EX 9 at 79. Dr. Velasco prescribed pain medication and modified the claimant's physical therapy prescription.

On August 28, 2000, the claimant was again examined by Dr. Manoharan, who reported that an August 8, 2000 MRI scan of the claimant's right shoulder "showed no definite rotator cuff tear" and that "no impingement was observed." EX 9 at 82. Dr. Manoharan released the claimant to return to work, but only if he did not engage in repetitive pushing or pulling, over-the-shoulder reaching with his right arm, or lifting of more than 10 pounds. EX 9 at 82.

On October 3, 2000, Dr. Manoharan examined the claimant and released him to return to work without any restrictions. EX 9 at 86-87. Thereafter, the claimant returned to work as a refrigeration mechanic. EX 6 at 17. On October 17, 2000, the claimant was again seen by Dr. Manoharan. CX 6 at 95c. Dr. Manoharan's report indicated that he released the claimant to return to work without restrictions because the claimant seemed to be a motivated worker and wanted to see how his shoulder would respond to his regular work activities. CX 6 at 95d.

On November 8, 2000, the claimant reported to Dr. Manoharan that he was currently performing his regular duties but that his right shoulder pain was an "annoyance." EX 9 at 91. Dr. Manoharan concluded that the claimant had returned to his pre-injury condition and that no further medical care or work restrictions were required. EX 9 at 91.

According to the claimant's trial testimony, after he returned to work his right shoulder was still painful and he couldn't move it very well. Tr. at 112-13. From that time until the end of April of 2001, the claimant testified, his shoulder condition worsened and he increased the amount of pain medication he was taking. Tr. at 114-15.

On February 21, 2001, the claimant was examined at the employer's request by Dr. Geoffrey M. Miller, a board-certified orthopedic surgeon. EX 6 at 16-30. Dr. Miller's report indicates that the claimant had begun experiencing problems with his right shoulder following an incident in 1998 and that injuries on September 7, 1999 and July 16, 2000 had caused his condition to worsen. EX 6 at 17. The report further indicates that the claimant returned to work in October of 2000, but felt that his condition had worsened since he had returned to work. EX 6 at 17. The report also notes that, according to the claimant, he had an intermittent aching neck pain and a continuous low-grade ache in his right shoulder that would worsen with any pushing, pulling, or prolonged reaching. EX 6 at 19. Dr. Miller further noted that the claimant's job as a mechanic had "some significant physical requirements" and, on occasion, required the claimant to lift as much as 50 pounds. EX 6 at 17. In summarizing the results of prior x-rays and MRI scans, Dr. Miller noted that the August 8, 2000 MRI scan of the claimant's right shoulder had been described by Dr. Manoharan as not showing a "definite rotator cuff tear or impingement." EX 6 at 20. After setting forth a detailed summary of the claimant's prior treatment records, Dr. Miller concluded that the claimant had a longstanding degenerative process in his cervical spine and right shoulder, but that he could "certainly continue with his usual duties." EX 6 at 26. Dr. Miller also opined that the claimant had apparently recovered from the 1999 injury, but that the July 2000 injury had caused some degree of permanent disability. EX 6 at 27-29.

While at work on the night of April 30, 2001, the claimant accidently drove a pickup truck into a chassis that had been parked in an inappropriate place. Tr. at 115-16. During the accident, the claimant's head hit the windshield of the pickup truck. Tr. at 116-17. The claimant did not notice any immediate pain and worked the remainder of his shift. CX 1 at 42. The next day, however, the claimant developed pain in his neck and right shoulder. CX 1 at 42. On May 9, 2001, he was again seen by Dr. Manoharan, who diagnosed the claimant's injury as consisting of cervical and right shoulder strains, but decided to obtain a MRI scan if the claimant's condition did not improve in three to four weeks. CX 6 at 94.

On May 10, 2001, the claimant was examined for the first time by Dr. Steven Nagelberg, a board-certified orthopedic surgeon, who concluded that the claimant was totally temporarily disabled and scheduled MRI scans of the claimant's neck and right shoulder. CX 1 at 42-46.

As requested by Dr. Nagelberg, on May 29, 2001 the claimant underwent a MRI scan of his right shoulder at Advanced Radiology in Beverly Hills, California. CX 5 at 82. According to the report of radiologist Ronald S. Grusd, the scan showed "complete supraspinatus and infraspinatus tendon tears," a "sprain/partial tear of the subscapularis tendon," a "SLAP lesion," and "moderately severe arthrosis of the acromioclavicular joint."

On June 11, 2001, Dr. Manoharan examined the claimant and decided that he should receive physical therapy for another two to three weeks, but could return to work in a light duty capacity if he did not do any activities that required him to push or pull, reach above his shoulders with his right arm, or lift more than 10 pounds. CX 6 at 89-90.

On June 12, 2001, the claimant was examined by Dr. Michael D. Roscoe, a board-certified orthopedic surgeon. EX 7. Dr. Roscoe's report sets forth the results of his physical examination of the claimant and characterized the claimant's April 30, 2001 injury as a "minor accident" that caused only a mild cervical sprain, headaches secondary to the cervical sprain, and a mild right shoulder sprain. EX 7 at 53. Dr. Roscoe also suggested that the claimant's condition would become permanent and stationary around August 1, 2001 and opined that the claimant had a "fairly good" prognosis. EX 7 at 53. On July 31, 2001, Dr. Roscoe prepared a supplemental report, which summarized Dr. Miller's report of March 26, 2001 and the report setting forth Dr. Grusd's interpretation of the May 29, 2001 MRI scan of the claimant's right shoulder. EX 7 at 55-56. Dr. Roscoe characterized the MRI findings as being "quite dramatic" and asked rhetorically, "when did these injuries take place?" EX 7 at 56.

On August 30, 2001, Dr. Grusd reviewed the films of the August 8, 2000 MRI scan of the claimant's right shoulder that Dr. Manoharan had characterized as failing to show any definite rotator cuff tear or impingement. CX 5 at 84. According to Dr. Grusd, the MRI films actually showed "findings compatible with a complete rotator cuff tear," fluid in the subdeltoid/subacromial bursa, and "arthrosis of the acromioclavicular joint with impingement on the underlying supraspinatus.[1] CX 5 at 84.

On September 11, 2001, the claimant underwent a MRI scan of his right shoulder at Max MRI Imaging in Encino, California. CX 4 at 73-74. According to the report of radiologist Jerrold Mink, the scan showed a "massive retracted and atrophic tear of the supraspinatus and infraspinatus" as well as an intermediate grade "partial tear of the subscapularis and the long head of the biceps tendon."

On October 23, 2001, the claimant was again examined by Dr. Nagelberg. CX 1 at 9-13. Dr. Nagelberg's report indicates that the claimant was continuing to experience pain in his right shoulder and that he had abduction and forward flexion weakness in the same shoulder. CX 1 at 10. Dr. Nagelberg concluded that the claimant would not benefit from right rotator cuff surgery because there was no remaining "viable tissue," but that he might benefit from a "shoulder fusion" in the future. CX 1 at 10. Dr. Nagelberg further concluded that the claimant's condition had become permanent and

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1. It is noted that Dr. Grusd's report erroneously indicates that this MRI scan was performed in 2001 rather than in 2000. CX 5 at 84.

stationary and opined that the claimant was permanently precluded from making repetitive use of his right arm at shoulder level or above or engaging in repetitive pushing and pulling activities. CX 1 at 11. In addition, Dr. Nagelberg opined that the claimant had lost 75 percent of his ability to perform lifting activities with his right arm and concluded that the claimant lacked the capacity to return to his usual work as a mechanic. CX 1 at 11-12. In a section of his report entitled "Apportionment," Dr. Nagelberg set forth a list of the types of activities that were required by the claimant's job and asserted that these activities caused a cumulative trauma which contributed to the claimant's right shoulder impairment. Nonetheless, he opined, 80 percent of the claimant's disability was attributable to his April 30, 2001 injury. CX 1 at 12.

On January 9, 2002, the claimant was again examined by Dr. Miller. EX 6 at 31. According to Dr. Miller's report, the claimant told him that even though he had not returned to work since his April 30, 2001 accident, his neck and right shoulder symptoms had not improved. EX 6 at 32. In the report, Dr. Miller described the x-rays and MRI scans that had been taken since he last saw the claimant and concluded that the claimant had a "chronic right shoulder impingement with documented rotator cuff tear" that was "long-standing and pre-existing." EX 6 at 34. In explaining his conclusion that the rotator cuff tear was longstanding, Dr. Miller referred to the MRI scan that, according to Dr. Mink, showed that the claimant had "advanced acromioclavicular joint arthritis and extensive scarring" in his right shoulder. EX 6 at 34. Dr. Miller then added that Dr. Grusd, who had interpreted the August 8, 2000 MRI of the claimant's right shoulder, had "clearly under-read" the scan and had thereby written a report that mistakenly gave the appearance that the claimant had suffered an acute injury. EX 6 at 34. In the report's conclusion, Dr. Miller opined that the rotator cuff tear identified on the MRI scan interpreted by Dr. Mink "had nothing at all to do with" the claimant's April 2001 injury and probably occurred in 1997. EX 6 at 35. He thus concluded that Dr. Nagelberg was in error in opining that 80 percent of the claimant's disability was due to the April 2001 injury. EX 6 at 35. He also opined that Dr. Manoharan could not have been correct when he reported that the August 2000 MRI of the claimant's right shoulder failed to show any definite evidence of a rotator cuff tear. EX 6 at 36. Dr. Miller further opined that the claimant did not in fact sustain a massive acute rotator cuff tear, as suggested by Dr. Nagelberg, but rather had a "long-standing scarred tear." EX 6 at 38. Dr. Miller also opined that the claimant's April 30, 2001 injury was nothing more than "an acute exacerbation or aggravation" of this prior condition. EX 6 at 39. Dr. Miller also concluded that the claimant "was never temporarily disabled" and asserted that he could have returned to his "regular duties" within eight weeks after his April 30, 2001 injury. EX 6 at 42.

Sometime around the middle of April in 2002, the employer sent the claimant a letter offering him a light duty job. Tr. at 119. Accordingly, on April 23, 2002, the claimant reported for work. Tr. at 119. However, according to the claimant, for the first five days after his return to work he was not assigned any work to perform. Tr. at 120. Thereafter, the claimant testified, he was assigned to repair electrical cords. Tr. at 120-25. According to the claimant, he repaired electrical cords for the next eight work days, but there were only enough broken cords to keep him occupied for two and one-half to five hours a shift. Tr. at 126-27. After these eight days, the claimant testified, his foreman, Michael Thompson, told him that he could not return to work until he had a release from his union, the International Association of Machinists and Aerospace Workers (the "IAM"). Tr. at 127, 129.

According to the claimant, he later sought a release from the union, but it refused to provide one.[2] Tr. at 127-28.

According to the testimony of Mr. Thompson, when the claimant arrived for work on April 23, 2002, he presented Mr. Thompson with a document setting forth his physical restrictions and a copy of the employer's letter offering him light duty employment. Tr. at 145. However, according to Mr. Thompson, he couldn't immediately conceive of any jobs that could be performed by the claimant, so he called a supervisor, who in turn called another supervisor. Tr. 146-47. After some discussion about possibly assigning the claimant to work in a parts room, Mr. Thompson recalled, he was told to just tell the claimant to stay on the premises. Tr. at 148-51. After another supervisor, Mike Dyson, returned from vacation a week later, Mr. Thompson testified, it was decided that the claimant would be assigned to repair broken cords. Tr. at 152. Before this time, according to Mr. Thompson's testimony, no one was regularly assigned to repairing broken cords and the task was performed only intermittently. Tr. at 152. Sometimes, he testified, no one would be assigned to repair cords for as long as a month or more. Tr. at 152-53. According to Mr. Thompson, he doesn't need anyone repairing cords on a full-time basis and it would be fair to characterize that task as being part-time work. Tr. at 157. Mr. Thompson also testified that after the claimant was told to stop working until he got a return-to-work authorization from his union, nobody was assigned to repair electrical cords until June of 2002, when another injured worker with medical restrictions returned to work. Tr. at 160-61. However, he testified, that worker eventually ran out of cords to repair and, after a period of time spent constructing new cords, was "just kind of standing by" for whatever work could be found for him. Tr. at 162-63.

Sometime in June of 2002, the claimant submitted a retirement application to the IAM. Tr. at 238. According to the claimant, he submitted the application because he didn't think that he would be able to work as a mechanic any more. Tr. at 238-39, 251.

On September 4, 2002, the claimant was again examined by Dr. Nagelberg. CX 1 at 1-4. In his report, Dr. Nagelberg set forth the result of his physical examination of the claimant's right shoulder and noted that the claimant was continuing to experience persistent right shoulder pain. Dr. Nagelberg further indicated that he had reviewed the "films" of the August 8, 2000 MRI of the claimant's right shoulder and determined that they showed "evidence of a large complete tear" of the claimant's right rotator cuff. CX 1 at 2. He further noted that the MRI of May 29, 2001 also showed

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2. A document given to the claimant by a union official indicates that the claimant's request for such a release was denied pursuant to section 2 of Article XXVI of the collective bargaining agreement between SSA Terminals and the International Association of Machinists and Aerospace Workers. CX 8, EX 17. Under that provision, an injured member of the union may not return to work unless he or she is released to work by his or her physician without restrictions. EX 17 at 22, CX 12 at 144. Under section 6 of that same Article, a union member returning to work after a leave of absence of more than seven work days must obtain a clearance from the union. EX 17 at 23. However, the union takes the position that any clearance granted under this section indicates only that the worker's dues have been paid in full. EX 16.

evidence of a "complete tear" and commented that both MRI scans also showed evidence of moderate to severe arthrosis of the AC joint with impingement of the underlying supraspinatus tendon. Dr. Nagelberg concluded that the tear in the claimant's right rotator cuff occurred prior to his April 30, 2001 injury, but that the April 30 injury further worsened his injury and asserted that comparison of the August 2000 scan with the results of the MRI scan of September 11, 2001 showed "extreme and significant worsening." CX 1 at 2. Dr. Nagelberg then indicated that he had reviewed the claimant's work duties with the claimant's employer and described those duties as requiring the claimant to engage in activities that would cause "continuing trauma" and aggravation of the claimant's prior injuries. As well, Dr. Nagelberg opined, the April 30, 2001 injury caused a permanent increase in the claimant's symptoms. CX 1 at 3.

On September 9, 2002, the claimant was examined by Dr. James C. Thomas, Jr., a board-certified orthopedic surgeon. CX 2 at 51-61. After setting forth the results of his physical examination of the claimant and summarizing the findings from the claimant's MRI scans and x-rays, Dr. Thomas indicated that it was his impression that the claimant had, *inter alia*, a rotator cuff tear in his right shoulder with acromioclavicular hypertrophy and a SLAP lesion. CX 2 at 56. Dr. Thomas also set forth a detailed discussion of prior medical reports concerning the claimant's injuries of July 16, 2000 and April 30, 2001. CX 2 at 57-58. Among other things, Dr. Thomas opined that: (1) although the MRI scan taken on August 8, 2000 showed no definite labral tear, the MRI scan of May 29, 2001 showed a "definite superior anterior labral tear," (2) that the labral tear occurred during the April 30, 2001 injury and contributed to the "significant deterioration" of the claimant's condition, (3) that both Dr. Manahoran and the radiologist who interpreted the August 8, 2000 MRI failed to recognize that the scan shows a "massive" right shoulder rotator cuff tear, (4) that because of this oversight, the claimant was allowed to return to work without restrictions, where his work activities caused continuous trauma to his right shoulder, and (5) that Dr. Miller's opinion that the claimant suffered a rotator cuff tear before 1997 is incorrect. CX 2 at 57-58. Dr. Thomas also concluded that the claimant was temporarily totally disabled. CX 2 at 59.

On August 21, 2002, the claimant was again examined by Dr. Miller. EX 6 at 43-48. In this report, Dr. Miller indicated that the claimant had said that he had been sent home from work because "no duty" was available and interpreted this statement as being an admission by the claimant that he could still be working in his occupation if work were available. EX 6 at 45. Dr. Miller also set forth the results of his orthopedic examination and reported that the claimant said he had pain "most of the time" in his neck and right shoulder. EX 6 at 45-47. In the conclusion of his report, Dr. Miller asserted that the claimant is "capable of performing his occupation," which Dr. Miller asserted was one that "does not have substantial physical requirements." EX 6 at 47.

ANALYSIS

The parties have stipulated that: (1) the claimant sustained sudden trauma injuries to his cervical spine and right shoulder while employed by SSA Terminals on July 16, 2000 and April 30, 2001, (2) that the injuries occurred on a maritime situs while the claimant was employed in a maritime status, (3) that the injuries occurred at a time when there was an employer-employee relationship

between the claimant and SSA Terminals, (4) that the claimant's average weekly wage at the time of the July 16, 2000 injury was $2,431.61, (5) that the claimant's average weekly wage at the time of the April 30, 2001 injury was $2,382.78, (6) that the claimant's July 16, 2000 injury reached the point of maximum medical improvement on October 17, 2000, (7) that the claimant's April 30, 2001 injury reached the point of maximum medical improvement on October 23, 2001, (8) that if the claimant cannot work for SSA Terminals he has a residual wage earning capacity of $400 per week, and (9) that the claimant has already been paid all benefits owed for periods of disability prior to April 20, 2002.

The primary dispute in this case concerns the extent of the claimant's disability since May 11, 2002.[3] In addition, if it is determined that the claimant's sudden trauma injuries did not cause his alleged permanent disabilities, there is also a dispute on the question of whether the claimant's alleged impairments are the result of work-related cumulative trauma.

In cases involving disputes over an injured worker's post-injury wage-earning capacity, the burden is initially on the claimant to show that he or she cannot return to his or her regular employment due to a work-related injury. *Bumble Bee Seafoods v. Director, OWCP*, 629 F.2d 1327 (9th Cir. 1980); *Trask v. Lockheed Shipbuilding Co.*, 17 BRBS 56, 59 (1980). If the claimant meets this burden, the employer must then establish the existence of specific and realistically available job opportunities within the geographic area where the employee resides which a person with the employee's technical and verbal skills is capable of performing. In determining if such job opportunities are realistically available, it is necessary to consider whether there exists a reasonable likelihood, given the claimant's age, education and background, that the claimant would be hired if he or she diligently sought the job. *See Hairston v. Todd Shipyards*, 849 F.2d 1194 (9th Cir. 1988); *Stevens v. Director, OWCP*, 909 F.2d 1256 (9th Cir. 1990). However, an employer need not show the existence of specific and realistically available job opportunities if the employer itself offers the claimant a bona fide job that the claimant is capable of performing. *Peele v. Newport News Shipbuilding and Dry Dock Company*, 20 BRBS 133, 136 (1987); *Darden v. Newport News Shipbuilding and Dry Dock Company*, 18 BRBS 224, 226 (1986).

Under the provisions of subsection 8(h) of the Act, an injured worker's actual post-injury earnings shall be considered indicative of his or her post-injury earning capacity, if such actual earnings "fairly and reasonably represent" the worker's wage-earning capacity. *See Devillier v. National Steel and Shipbuilding Co.*, 10 BRBS 649, 660 (1979). However, it is well established as a matter of law that the actual post-injury wages of an injured worker are not a valid measure of the worker's true earning capacity if the wages were earned in a job that constituted "sheltered employment," or if the worker was in fact being "carried" by other workers. *See Harrod v. Newport News Shipbuilding and Dry Dock Company*, 12 BRBS 10 (1980) (decision acknowledging the general rule that an injured

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3. Although the claimant contends that the alternative job he performed from April 23 to May 10, 2002 was a make-work job that did not constitute suitable alternative employment, he has elected to simplify his claim by limiting his claim for permanent partial disability benefits to the period beginning on May 11, 2002. Tr. at 31.

worker's post-injury earnings are not representative of the worker's true earning capacity if the claimant's job constituted sheltered employment and holding that a job constitutes sheltered employment if an employee is being paid for performing duties beyond the employee's capacities or if a job is unnecessary to the employer's operations and has been created merely for the purpose of placing a claimant on the payroll); *Harris v. Atlantic & Gulf Stevedores, Inc.*, 9 BRBS 7 (1978) (holding that the wages of a worker who is being "carried" in the performance of his job duties by other workers are not indicative of the worker's true wage earning capacity). Likewise, an injured worker's post-injury wages are not an accurate representation of the worker's actual earning capacity if the worker was able to work only through "extraordinary effort and in spite of excruciating pain." *Haughton Elevator Co. v. Lewis*, 572 F.2d 447 (4th Cir. 1978).

In considering medical evidence concerning a worker's injury, a treating physician's opinion is entitled to "special weight." *Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998). In fact, in the Ninth Circuit clear and convincing reasons must be given for rejecting an *uncontroverted* opinion of a treating physician. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). However, the Ninth Circuit has also held that a treating physician's opinion is not necessarily conclusive and may in some circumstances be disregarded, even if uncontradicted. For example, an administrative law judge may reject a treating physician's opinion that is "brief and conclusionary in form with little in the way of clinical findings to support [its] conclusion." *Id.* In addition, an administrative law judge can reject the opinion of a treating physician which conflicts with the opinion of an examining physician if the ALJ's decision sets forth "'specific, legitimate reasons for doing so that are based on substantial evidence in the record.'" *Id.*

It is also noted that under the so-called "aggravation rule," a claimant seeking benefits under the Longshore Act does not have to show that a work injury was the sole cause or even the principal cause of a disability. Rather, a claimant need only show that an employment-related injury aggravated, accelerated, or combined with a pre-existing impairment. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 839 (9th Cir. 1991). If a claimant is successful in making such a showing, his or her entire impairment is compensable. *Id.*

In this case, the claimant asserts that after his injury of April 30, 2001, he was no longer capable of performing the duties of his job as a reefer mechanic. As a result, he alleges, his average weekly earning capacity declined from $2,382.78 to a residual earning capacity of $400. In contrast, the employer declines to concede that the claimant cannot continue to perform his former duties as a reefer mechanic. As well, the employer contends that even if the claimant cannot perform those duties, he is still able to perform the alternative job as a cord repairer that was offered to him in April of 2002.

The preponderance of the evidence indicates that even if the claimant's traumatic work-related injuries of July 16, 2000 and April 30, 2001 did not cause the rotator cuff tear shown by the various MRI scans of the claimant's right shoulder, those injuries did in fact permanently aggravate the claimant's right shoulder impairment. In particular, this conclusion is supported by the reports of Dr. Thomas and Dr. Nagelberg, each of which is more convincing that those reports of Dr. Miller that

might be interpreted as suggesting a different conclusion. It is further concluded that the reports of Dr. Thomas and Dr. Nagelberg also warrant a conclusion that the claimant's performance of his regular work duties between October of 2000 and April 30, 2001 caused cumulative trauma to the claimant's right shoulder, which also contributed to his right shoulder impairment.

The weight of the evidence also supports a finding that the injuries to the claimant's right shoulder that occurred between July 16, 2000 and April 30, 2001 permanently preclude the claimant from performing his usual and customary job as a reefer mechanic for SSA Terminals. In this regard, it is noted that the claimant's testimony indicates that his duties as a reefer mechanic required him to perform a variety of activities that required the use of his right arm and that his treating physician, Dr. Nagelberg, has concluded that the claimant's right shoulder impairment precludes him from continuing to perform such duties. It is recognized that Dr. Miller opined in his September 30, 2002 report that the claimant is still capable of working as a mechanic. However, as Dr. Miller indicated in his report, this conclusion appears to be based on Dr. Miller's belief that the only reason the claimant stopped working was because his regular work as a mechanic was not available to him. As demonstrated by the trial testimony of the both the claimant and Mr. Thompson, that belief was in error, and, in fact, the reason the claimant was not working when last examined by Dr. Miller was because of the employer's inability or unwillingness to make **light** duty work available to him. It is also noted that Dr. Miller's assertion in his September 30, 2002 report that the claimant's job as a mechanic did not have "substantial physical requirements," is inconsistent with the statement in his report of March 26, 2001 that the claimant's job had some "significant physical requirements" and sometimes entailed lifting up to 50 pounds.

Finally, the weight of the evidence also indicates that the claimant's job repairing damaged electric cords in April and May of 2002 was in effect sheltered employment and therefore did not constitute suitable alternative employment.[4] In this regard, it is noted that the evidence shows that the cord repair work assigned to the claimant failed to keep him occupied during the entirety of any of his shifts and that the employer does in fact not have any real long-term need for someone to repair cords on a full time basis. *See Harrod v. Newport News Shipbuilding and Dry Dock Company, supra*.

4. During the trial, the claimant withdrew his contention that the collective bargaining agreement between the employer and the IAM precluded the employer from offering him a job repairing electric cords or any other sort of light duty employment. Tr. at 254-55. Accordingly, this issue has not been addressed in this Decision and Order.

ORDER

1. Beginning on May 11, 2002 and until ordered otherwise, the employer shall pay the claimant permanent partial disability benefits at a rate of $933.82 per week.

2. The employer shall pay interest to the claimant on each unpaid installment of compensation from the date the compensation became due at the rates specified in 28 U.S.C. §1961.

3. The District Director shall make all calculations necessary to carry out this order.

4. The employer shall provide the claimant all medical care that may be reasonable and necessary for the treatment of the sequelae of the work-related neck and right shoulder injuries that occurred between July 16, 2000 and April 30, 2001.

5. The counsel for the claimant is hereby ordered to prepare an Initial Petition for Fees and Costs and directed to serve such petition on the undersigned and on the counsel for the employer within 20 calendar days after the service of this Decision and Order by the District Director. Within 20 calendar days after service of the fee petition, the counsel for the employer shall initiate a verbal discussion with the counsel for the claimant in an effort to amicably resolve any dispute concerning the amounts requested. If the two counsel thereby agree on the amounts to be awarded, they shall promptly file a written notification of such agreement. If the counsel fail to amicably resolve all of their disputes, the counsel for the claimant shall, within 30 calendar days after the date of service of the initial fee petition, provide the undersigned and the counsel for the employer with a Final Application for Fees and Costs which shall incorporate any changes agreed to during his discussions with the counsel for the employer and shall set forth therein the final amounts he requests as fees and costs. Within 14 calendar days after service of the Final Application, the counsel for the employer shall file a Statement of Final Objections and serve a copy on the counsel for the claimant. No further pleadings will be accepted unless specifically authorized in advance. For purposes of this paragraph, a document will be considered to have been served on the date it was mailed.

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Paul A. Mapes
Administrative Law Judge